

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JUDY A. REED</b>	)	
Claimant	)	
VS.	)	
	)	
<b>USD 453</b>	)	
Respondent	)	Docket No. 256,125
	)	
and	)	
	)	
<b>KS ASSOCIATION OF SCHOOL BOARDS</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant, respondent and its insurance carrier all appealed from the July 30, 2002 Award entered by Administrative Law Judge Robert H. Forschler. The Appeals Board (Board) heard oral argument on January 7, 2003.

**APPEARANCES**

Steven C. Alberg of Olathe, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATION**

The Board considered the record and adopts the stipulations listed in the Award.

**ISSUES**

Judge Forschler found claimant was entitled to an award for permanent partial disability compensation based upon a “ten percent loss of use of the right lower extremity.”<sup>1</sup> Claimant contends that her disability should have included a permanent impairment to her back and, therefore, should have been a general body disability. Judge Forschler denied claimant a general body disability finding her “back complaints. . . to be transitory and more probably related to her sitting job later.” Respondent and its insurance carrier (respondent) agree with the judge’s decision limiting the award to a scheduled injury, but contend the judge erred in the calculation of claimant’s average weekly wage. Specifically, respondent contends that the two part-time jobs claimant was performing were not the “same” or “very similar” and, therefore, claimant was not entitled to an aggregation of the wages paid by respondent and Countryside Maintenance, her other employer.<sup>2</sup>

Accordingly, the issues for Board review are the nature and extent of claimant’s disability and her average weekly wage.

**FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

In the winter of 2000, claimant was working two part-time jobs. Sometime in January or February 2000 claimant was working at her cleaning maintenance/custodial job with Countryside Maintenance at the Munsen Army Hospital at Fort Leavenworth when she slipped and fell down some stairs injuring her knee and ankle. This accidental injury was the subject of a separate claim which has been settled. The subject of this claim, the case now before the Board, involves a March 8, 2000 accident that arose out of and in the course of claimant’s employment in food service with United School District No. 453. Claimant was washing dishes in the school cafeteria. As she was pushing a tray of dishes into the dishwasher, claimant twisted her right knee. Claimant described a snap or a pop whereupon her knee swelled up.

As these two incidents constitute two separate and distinct accidents, the plain language of K.S.A. 44-511(b)(7) would appear not to apply to this claim. By its terms, that statute applies when “. . . an employee . . . sustains an injury by accident arising out of and in the course of multiple employment . . . .” In this case, claimant’s injury was an aggravation of a preexisting condition, but, nevertheless, was a separate and distinct accident arising out of and in the course of a single employment, to wit: claimant’s employment with respondent. However, in interpreting K.S.A. 44-511(b)(7) the Kansas Supreme Court said:

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<sup>1</sup> See K.S.A. 44-510d(a)(15) and (16). Claimant’s right lower extremity injury was at the knee level. The award was calculated utilizing the 190 weeks scheduled for the lower leg rather than the 200 weeks for a leg. The award calculation, however, was not raised or mentioned by either party on appeal.

<sup>2</sup> K.S.A. 44-503a and K.S.A. 44-511(b)(7).

With respect to who is eligible for wage aggregation, the statute identifies a part-time employee who performs the same or similar work for more than one employer. . . . The statute reasonably can be read to define multiple employment as employment for **one** or more employers in which the employee performs the same or similar work on a part-time basis for each. (*emphasis added*)<sup>3</sup>

Nevertheless, claimant's average weekly wage for purposes of this claim should not be "the total average gross weekly wage of such employee paid by all the employers in such multiple employment" under Subsection 7 of K.S.A. 44-511(b) because her two part-time jobs were not "the same or very similar type of work." The Countryside Maintenance job was a general cleaning or custodial type job including vacuuming, sweeping, mopping, dusting and emptying trash cans. And although sweeping, cleaning tables and washing dishes was also required, the job with the school district primarily involved the preparation and serving of food. Accordingly, claimant's average weekly wage will be based solely upon her wages from respondent which the parties have stipulated to be \$167.01 per week.

As a result of her injury, claimant underwent arthroscopic knee surgery on May 22, 2000. The surgery was performed by orthopedic surgeon Andrew R. Scott, M.D., who specializes in conditions of the knee and shoulder. Following surgery claimant was placed in a mid-thigh to ankle brace to keep her leg in a straight position and was provided a course of physical therapy. Claimant described instances where her knee has "locked-up" causing her to fall and jar her back. In addition, claimant walked with a limp which further contributed to her back problems. When claimant reported her back symptoms to the physical therapist she was referred back to Dr. Scott. Claimant also reported her back problems to Dr. Scott who sought authorization from the respondent's insurance carrier to examine claimant's back and, if necessary, make a referral to another physician for treatment. His office notes of August 29, 2000 includes the following:

"The patient is seen approximately three months postoperatively for her right knee. It is not bothering her significantly. She has been performing her exercises. She says that what is bothering her most now is lower back pain that has become significantly worse recently. She says that this developed when she fell during the early postoperative period landing on her knees. The pain is not radicular in nature. . . . I indicated that I would be glad to perform an initial evaluation on her back and obtain appropriate x-rays, making an appropriate referral to a back specialist after that. We discussed this with her Workman's Compensation insurance carrier and they would not approve me seeing her for the back."

The fact that Dr. Scott admittedly does not treat backs, did not examine claimant's

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<sup>3</sup> *Kinder v. Murray & Sons Constr. Co.*, 264 Kan. 484, 494, 957 P.2d 488 (1998).

back and saw claimant only once after August 29, 2000, makes his opinion concerning the permanency of claimant's back injury of little value.

The only medical expert to examine claimant's back was Dr. Peter Bieri, who saw claimant at the request of her attorney on September 28, 2001. Dr. Bieri found claimant to have a five percent permanent impairment to the body as a whole as a result of her low back condition which he attributed to her gait derangement (limp). Dr. Bieri also found claimant to have a 22 percent impairment to her right lower extremity, which he apportioned five percent to the February 2000 accident and 17 percent to the March 8, 2000 accident. All of Dr. Bieri's rating were pursuant to American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). He combined the 17 percent lower extremity rating with the five percent whole person rating to arrive at a combined 12 percent whole person impairment which he attributed solely to the second accidental injury, that is the March 8, 2000 accident which arose out of and in the course of claimant's employment with respondent.

The Board finds Dr. Bieri's opinions on causation and impairment to be the most comprehensive and persuasive expert medical opinions in this record. Accordingly, claimant is entitled to an award based on a 12 percent general bodily disability based on her average weekly wage of \$167.01 and a compensation rate of \$111.35.

#### AWARD

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of the Administrative Law Judge Robert H. Foerschler Award should be modified as follows:

Claimant is entitled to receive 9.29 weeks of temporary total disability benefits at the compensation rate of \$111.35 per week, or \$1,551.52, plus 49.8 weeks of permanent partial general disability benefits at \$111.35 per week, or \$5,545.23 for a total of \$7,096.75 for a 12 percent permanent partial general disability all which is due and owing claimant less any amounts previously paid.

All authorized, reasonable and related medical treatment is ordered paid by respondent and its insurance carrier.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven C. Alberg, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent  
Robert H. Foerscher, Administrative Law Judge  
Director, Division of Workers Compensation